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Supreme Court of the United States.

OCTOBER TERM, 1941.

BOSTON AND MAINE RAILROAD,
Petitioner,
v.
JAMES H. CUNNINGHAM,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petition of Boston and Maine Railroad, a corporation duly organized by law, and having an usual place of business in Boston, respectfully shows:

Summary and Short Statement of Matter Involved.

This is an action of tort originally brought in the Superior Court for Hampden County, Commonwealth of Massachusetts, by the respondent, the plaintiff therein, to recover of the petitioner, the defendant therein, damages arising out

of an alleged accident to the respondent, the plaintiff therein, as the result of being run into by a baggage truck operated by fellow-employees. The defendant's answer was a general denial, contributory negligence, and assumption of risk. The case was tried to a jury before Judge Baker of the Massachusetts Superior Court, and the jury returned a verdict for $7500 for the respondent, plaintiff therein.

At the close of the evidence, the petitioner, defendant therein, filed a motion for a directed verdict, which motion was denied subject to the exceptions of the petitioner. The case was submitted to the jury under appropriate instructions as to negligence, contributory negligence, assumption of risk, and as to damages, to which instructions no exceptions were taken. The jury returned a verdict on October 25, 1940, for the plaintiff in the sum of $7500, but before the recording thereof the judge, who had previously expressed doubt to counsel for both parties as to the sufficiency of the plaintiff's evidence on negligence, reserved leave under G.L. (Ter. Ed.) c. 231, sec. 120, to enter a verdict for the defendant. The defendant on October 26, 1940, filed a "motion for judgment" on its motion for a directed verdict under leave reserved. The Court on November 21, 1940, endorsed upon the defendant's "motion for judgment": "After hearing, Motion allowed." The plaintiff seasonably excepted to the Court's allowance of the defendant's motion for judgment. The plaintiff seasonably filed a bill of exceptions and the case was heard by the Supreme Judicial Court of the Commonwealth of Massachusetts. In the opinion rendered by the Supreme Judicial Court, which appears in the record submitted herewith, the Supreme Judicial Court sustained the plaintiff's exceptions and by rescript left nothing for the Superior Court to do but enter judgment for the plaintiff, which was done on July 9, 1941.

Jurisdiction.

Since this is an action under the Federal Employers' Liability Act (Act of April 22, 1908, c. 159, 35 Stats. 65, U.S.C. Title 45, c. 2, sec. 51 *et seq.*), and since the case cannot be properly decided on any independent ground of local law, it is submitted that, final judgment in said case having been entered on July 9, 1941, in the Superior Court, Hampden County, Commonwealth of Massachusetts, in accordance with the rescript of the Supreme Judicial Court (Record, page 12), the jurisdiction of this Court to review said judgment is properly invoked under United States Code, Title 28, sec. 344(b). The Supreme Judicial Court of Massachusetts, in sustaining the plaintiff's exceptions to the ruling of the trial judge, in effect held that there was evidence to go to the jury on the question of the defendant's negligence. It also held that the defendant had failed to sustain its claim that the plaintiff had assumed the risk of his occupation and ignored the defendant's claim that under the rules of the Federal Court there was no credible evidence of an accident. The action of the judge of the Superior Court should have been affirmed if, under the facts of this case, and under the rules of the Federal Court, the plaintiff had failed to sustain his contentions, *first,* that there was an accident; *second,* that it was caused by negligence of the defendant, its agents or servants; and *third,* that the plaintiff had not assumed the risk of his occupation.

Questions Presented.

Whether, on the record, there is evidence to go to a jury from which the jury could find, *first,* that there was an accident; *second,* that it was caused by the negligence of the defendant, its servant or agent; *third,* that the plaintiff was

not contributorily negligent; *fourth,* that the plaintiff did not assume the risk.

Reasons for Granting the Writ.

The case here presented for review constitutes an utter and complete disregard by the Supreme Judicial Court of Massachusetts of those principles enunciated by the Supreme Court of the United States and the various Circuit Courts of Appeal in construing the provisions of the Federal Employers' Liability Act. Since it is settled that cases under the Federal Employers' Liability Act are subject to review by the Supreme Court on the entire record to determine if the evidence is sufficient, as a matter of law, to show negligence, and since it is settled that the State Courts must be governed in their interpretation and trial of cases under this Act by the decisions of the Federal Courts, the complete disregard of those decisions as evidenced by the opinion of the Massachusetts Supreme Judicial Court constitutes an invasion of the Railroad's right to have its liability determined under the Federal Act. It is therefore respectfully submitted that this case is one calling for the exercise by the Supreme Court of the United States of its supervisory powers and this Court should review the decision of the Supreme Judicial Court of Massachusetts and the Superior Court for the County of Hampden, and finally reverse it.

Wherefore it is respectfully submitted that the petition should be granted.

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Attorneys for Petitioner.